CHEW PENG CHENG

v.

ANTHONY TEO TIAO GIN

HIGH COURT SABAH & SARAWAK, SIBU
HAMID SULTAN ABU BACKER JC
[CIVIL SUIT NO: 22-57-1998]
18 MARCH 2008

TORT: *Defamation - Libel - Published letters containing certain facts regarding association's conducts - Whether defamatory - Whether there was element of malice - Defence of fair comment and qualified privilege - Defamation Act 1957, ss. 8, 9*

The defendant upon assuming the position of the Chairman of the Chiang Chuan Association (the Association) from the plaintiff had signed two letters addressed to the plaintiff averring *inter alia*; (i) that building of a petrol station on the Association's land in Sibu Town District without first converting the Association's land from agricultural to commercial land was not proper and contravened the restriction and condition stated in the lease of the Association's land risking forfeiture by the Sarawak Land Registry; (ii) that the plaintiff had disregarded the Rules and Constitution of the Association and charged the Association's land to Public Bank Berhad to finance the construction of the petrol kiosk during the plaintiff's tenure as the Chairman; (iii) the CCB's refusal to remit half of the premium payable in respect to the conversion of the Association's land and liable of forfeiture by the Sarawak Land Registry of the Association's land. The defendant submitted that as the chairman of the Association, he was obligated to protect the proprietary interest of the Association's land and relied on the statute based defence under ss. 8 and 9 of Defamation Act 1957 together with the common law defence of qualified privilege in publishing both the letters. The plaintiff surmised that during his tenure as Chairman of the Association that there was complete transparency in discharging his duty to secure the conversion of the Association's land, construction of the petrol kiosk and in his application to procure loan from Public Bank Berhad to finance the construction of the petrol kiosk which was a collective act of the Association. The plaintiff further argued *inter alia*; (i) that the two letters were capable of bearing the defamatory meanings; (ii) that in publishing the letters the defendant was actuated by actual malice, spite and ill-will. Hence, the application.

Held (dismissing plaintiff's action for defamation):

(1) The plaintiff's claim for defamation must fail. The definition of defamation is not a static concept to give recognition to the time immemorial principle that there must be certainty in law. The words complained of by the plaintiff could not be construed as defamatory in this time and era where public perception to accountability, transparency, good governance in respect of people holding office, or position, or those involved in the affairs of organisation such as associations has become more and more a subject matter of critical scrutiny by the public or by those who are associated with it. (para 14)

(2) As such, purely objecting to criticism by filing suits for defamation in millions of ringgit when issues of transparency, accountability and good governance is the focal point of the attack, does not promote constitutional rights to freedom of speech. The court would be reluctant to entertain them unless the attacks are in the nature which has no nexus and/or is not inextricably interwoven to the concept of transparency, accountability and corporate governance, and such acts are done with malice purely to assassinate the character of the individual personality and destroy his family, quality of life and privacy. The words complained of do not expose the plaintiff to hatred, ridicule or contempt or contempt in the mind of a reasonable man in this time and era, or would tend to lower the plaintiff in the estimation of right thinking members of society. (para 14)

(3) The circumstances leading to the publication of the purported offensive words and the defendants have proved substantial justification of the whole libel and there did not appear to be any element of malice, taking into consideration the complaint and dissatisfaction was addressed to the plaintiff directly. (para 14)

(4) The submission of the defendants on fair comment had some merits and the defendants were entitled on the facts of the case to make such comments though it may be critical. Any fair minded person would have reasonably done so. There was no element of malice. It could not be said the facts stated in the publication were false or the defendant made the publication recklessly. (para 14)

(5) There was merit in the submission of the defendant in respect of the defence of qualified privilege. It was beyond doubt in this case that there was a legal, moral, or social duty to make the statement on one side and there was corresponding interest to receive it on the other side and from the facts leading to the publication, the defendant's conduct was not spiked with malice. (para 14)

Case(s) referred to:
Adam v. Ward [1917] AC 309 ***(refd)***
Allsop v. Church of England Newspaper Ltd [1972] 2 QB 161 ***(refd)***
Berkoff v. Burchill 4 All ER 1008 ***(refd)***
Chok Foo Choo v. The China Press Bhd [1999] 1 CLJ 461 CA ***(refd)***
E Hulton & Co v. Jones [1910] AC 20 ***(refd)***
Faryne v. Chorny [1951] 4 WWR 171 ***(refd)***
Horrocks v. Lowe [1975] AC 135 ***(refd)***
JB Jeyaretnam v. Goh Chok Tong [1984] 1 LNS 139 HC ***(refd)***
Jones v. Skelton [1963] 3 All ER 952 ***(refd)***
Knappffer v. London Express Newspaper Ltd [1944] AC 116 ***(refd)***
Lee Kuan Yew v. JB Jeyaretnam [1978] 1 LNS 93 HC ***(refd)***
Merivale v. Carson [1888] QBD 275 ***(refd)***
Newstead v. London Express Newspapers Ltd [1940] 1 KB 377 ***(refd)***
Rajagopal v. Rajan [1971] 1 LNS 117 FC ***(refd)***
Sim v. Stretch [1936] 2 All ER 952 ***(refd)***
Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Berhad & Anor [1973] 1 LNS 146 HC ***(refd)***
Tolley v. JS Fry & Sons Ltd [1931] AC 333 ***(refd)***
Tun Datuk Patinggi Hj Abdul Rahman Ya'kub v. Bre Sdn Bhd & Ors [1995] 1 LNS 304 HC ***(refd)***
Workers' Party v. Tay Boon Too; Workers' Party v. Attorney-General [1975] 1 MLJ 47 ***(refd)***

Legislation referred to:
Defamation Act 1957, ss. 7, 8, 9, 11
Federal Constitution, art. 127
Rules of the High Court 1980, O. 14A, O. 33

Other source(s) referred to:
Gately on Libel and Skender, 6th edn
Ramsamalar Poopalasingam, *The Law of Defamation in Malaysia and Singapore*, [1988] MLJ 1

For the plaintiff - George Lim; M/s Battenberg & Talma Advocates
For the defendant - Paul Liong; M/s Liong & Co Advocates

Reported by Suhainah Wahiduddin

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JUDGMENT

Hamid Sultan Abu Backer JC:

[1] This is my judgment in respect of the defamation suit which the parties have agreed to settle by an application under O. 14A of RHC 1980. The plaintiff's application seek the following orders:

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(1) whether the two letters both dated the 24-02-1998 and signed by the defendants as Chairman of the Chiang Chuan Association addressed to the plaintiff and copied to the Registrar of Societies, Kuching, YB. Soon Choon Teck, Sibu who was the advisor of the Association and a Council Negeri Member and a Deputy Minister and Messrs. Tiong, Lim & Wong Advocates, Sibu a firm of Solicitor and Advocates in Sibu, Sarikei and Kuching referred in paragraph 3 of the Statement of Claim herein is capable of bearing the meanings or such of the meanings claimed by the plaintiff in paragraph 5 of the Statement of claim?;

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(2) whether publication of the two letters referred in paragraph 3 of the statement of claim were made on privileged occasion on matter of common interest which the defendant as chairman of Chiang Chuan Association has a duty, either legal, social or moral to make and the plaintiff in his respective capacity as retired chairman and member of Chiang Chuan Association a reciprocal interest to receive them pleaded in the paragraph 23(c) of the Defence and Counterclaim?;

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(3) whether in law there is such privilege for communication made in the reasonable and ordinary course of business on an occasion subsidiary to the occasion referred to in paragraph 23(h) of the defence and counterclaim namely justification plea;

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[2] The grounds of the application are:

(1) that whether the publication of the two letters are capable of bearing the defamatory meanings as claimed by the plaintiff, and says this is a question of law for the judge and can appropriately be dealt with under O. 14A and O. 33;

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(2) that the questions in para. A(2) to (5) are also questions of law for the judge which can appropriately be dealt with under O. 14A and O. 33; and

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(3) that defence discloses no reasonable defences and is frivolous or vexatious or are an abuse of the process of the court.

[3] The two offending letters complained reads as follows: A

First letter

Re: Lot 2454 Sibu Town District. The above refers.

(1) We had continually demanded for return of the original title deed of the land but to no avail. Our search at the Land & Survey Department reveals that the land was surprisingly caveated by Public Bank Berhad on 9 October, 1991 by virtue of a Memorandum of Charge dated 7 October, 1991 for a loan of RM600,000. The memorandum of charge was signed and executed by you and 2 others as the then Trustees of the Association. B C

(2) Our perusal of the Association's minute books at the relevant time does not reveal any CONSENT or AUTHORITY of the General Meeting or Association empowering you and the other Trustees to charge the Association's land to Public Bank Berhad for the purpose of borrowing RM600,000. Rule 23(b) of the Rules and constitution of the Association clearly states: D

> The Trustee shall not sell, charge borrow withdraw or transfer any of the property of the Association without the consent and authority of the General meeting of members. E

> And Rule 23(d) further states: F

> any dealing with the immovable properties belonging to the association shall be decided by three forths of the total voting membership of the Association.

(3) It is with regret that you as the then Chairman and one of the Trustees of the Association had blatantly *(sic)* disregarded the above Rules in charging the land to Public Bank Berhad to secure a loan of RM600,000 of the benefit of CHIANG CHUAN BERHAD. All the trust bestowed on you by the Association had been betrayed by your act. G

(4) If no acceptable explanation as to the whereabout of the title deed and above matter is not *(sic)* received by us within 7 days from the date of this letter we may consider further action on the matter. H

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Second letter

Re: Lot 2454 Sibu Town District

Your letter dated 11 December 1997 refers.

(1) We regret to not to *(sic)* continued stance of refusing to abide with our demand to pay for your ½ share of the premium amounting to RM53,000. As stated clearly in our earlier letter failure by you to pay your share had resulted in our withholding payment of our share to the Land & Survey Department.

(2) We would reiterate that the committee is merely entrusted to carry out the resolution of the Association's extraordinary general meeting of 3 December 1995 and your threats to hold the committee responsible for all consequences is very irresponsible and unbecoming. The committee will continue to unselfishly protect the interest of the Association and remedy those detrimental to the Association.

(3) When we agreed to sublet the land to Chiang Chuan Berhad for 30 years at a nominal rental we are not obligated to pay for the premium. We are therefore already very charitable on our part when we agreed to pay for ½ of the premium and which premium we could have refused to pay a single cent.

(4) It was our intention that if you had agreed to pay for your share of the premium we will let matters rest as it is. However, it was your continued intransigence *(sic)* that compelled us to probe deeper into the transaction involving the land which belongs to the Association.

Brief Facts

[4] The plaintiff says, (i) he is a well known banker and businessman. (ii) at the material time, the plaintiff was the chairman of Chiang Chuan Berhad ("Berhad") a holding and investment company set up for members of the Chiang Chung Associations ("Association"). The Chairman of Berhad, a holding and investment company set up for members of the Chiang Chuan Association ("Association") and Chiang Chuan Petrol Station Sdn. Bhd., wholly-owned subsidiary of the Berhad, which operates a petrol kiosk cum services station on Lot 2454 Sibu Town District ("Association's land") mentioned in the two letters complained of herein. This land is subleased from the Association by the Berhad ("Berhad Sublease") who in turn subleased the same to Shell Timur Sdn. Bhd. ("Shell Sublease"). (iii) the managing director of

Wah Tat Bank Berhad ("WTBB") a commercial bank with its head office in Sibu and branches throughout the country. (iv) a senior member of the Sarawak Bar. (v) between 1987 and 1991 ("relevant period") the plaintiff was the chairman of the Association. He was also one of the trustees of the Association, (vi) whether the publication of the two letters referred in para. 3 of the statement of claim was justified as pleaded in para. 23(h) of the defence and counterclaim. (vii) the words in paras (2) and (3) of the first letter and paras (2) and (4) of the second letter in their natural and ordinary meaning meant and were understood to mean:

> (1) that the plaintiff was a completely untrustworthy person; (2) that the plaintiff was a dishonest and unscrupulous person; (3) that the plaintiff was a hypocritical and insincere person; (4) that the plaintiff was not fit to hold office in any organization or association or society; (5) that the plaintiff was an irresponsible person and had acted in any unbecoming manner in the discharge of his duty and/or corruptly abused his power of office as chairman and trustee of the Association; (6) that the plaintiff was guilty of dishonorable and/or unprofessional conduct; (7) that the plaintiff was guilty of breach of trust as chairman and trustee of the Association; (8) that the plaintiff as the chairman and trustee of the association had abused all confidence and trust reposed in him by the Association; (9) that the plaintiff was a bully; (10) that the plaintiff had been guilty of conflict of interests as the then chairman of the Association in borrowing the RM600,000 from the Public Bank Berhad ("Public Bank Loan") for the Berhad and charging the Association's land to secure same and the Berhad Sublease because he was the Chairman of the Berhad; (11) the plaintiff had acted surreptiously with regard to the Public Bank Loan; (12) that the Plaintiff is a treacherous person; (13) that the plaintiff is a stubborn and unreasonable person.

(ix) The plaintiff says, the defendant published the defamatory matters with the ulterior purpose of putting pressure on the plaintiff to get him as the chairman of the Berhad to get the Berhad to come up with half share of the premium for the conversion and extension of the title of the said land.

Particulars

(1) During a meeting on 15-08-1995 at the premises of the Association called by the defendant in his capacity as Chairman of the Association at which the plaintiff and several representatives of the Berhad were present on the invitation of the defendant and also attended by several representatives of the Association the Public Bank loan arrangement and the premium matter were discussed. The defendant had at that

meeting expressed his stand that the premium should be paid by the Association by right and that he would explain the matter to his committee. Subsequently at the extra-ordinary general meeting of the Association on 3-12-1995 the defendant had made an about turn. He pushed through a resolution that the premium should be paid by the Association.

(2) At another meeting at the office in the clinic of Dr. Soon Choon Teck on the 16-07-1996 called by the defendant and attended by the plaintiff and the defendant, the Public Bank loan arrangement and premium matter were discussed before Dr. Soon and the Advisor of the Association, one Wee Ho Soo. The defendant had again said at this meeting the premium should be paid by the Association. Subsequently according to Dr. Soon the defendant reneged on his statement.

(3) The Association's application for conversion and extension of the title of the said land was approved on 11-08-1994 but the defendant as the chairman and trustee of the Association made no attempt to pay the premium even though the Lands & Surveys had threatened forfeiture.

(4) The defendant had contacted Shell to inform them that the Association would not pay for the premium for the conversion and extension of the title of the Association's land.

(x) The plaintiff says that, in publishing the defamatory matters the defendant was actuated by actual malice, spite and ill-will towards the plaintiff.

Particulars

(1) The Berhad's petrol kiosk cum service station is on the Association's land and its forfeiture by the Lands and Surveys would cause a cessation of its business and prejudice the Berhad's sublease and the Shell's sublease thereby exposing the Berhad to grave financial losses and damages. The Plaintiff as the Chairman of the Berhad would be seriously embarrassed and compromised;

(2) The defendant knew that the non-registration of the Berhad's sublease and the Shell's sublease with the Lands and Surveys on account that the title of the land had not been converted and extended because the premium had not been paid is a matter of great concern to Shell and this in turn is embarrassing to the plaintiff

(3) The particulars pleaded in paragraph 6.2 [1] and [2] hereof; A

(4) The defendant had previously by letter of 21-5-1996 accused the plaintiff of conflict of interest and because the plaintiff merely reserved his right to sue him the defendant had become emboldened.

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(5) At an extraordinary general meeting sometime in October, 1995 the defendant had called the plaintiff and his brother Dr. Chew Peng Hui who is also a practicing lawyer, outdated as regards their knowledge of the law on the question of responsibility for payment of premium for conversion and extension of title of the said land of the association.

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(xi) The plaintiff says, in publishing the defamatory matters the defendant knew that the plaintiff as a banker and a professional is most sensitive and vulnerable to suggestions of betrayal of trust and improper dealings. D

And the plaintiff claims an injunction to restrain such publication and aggravated and general damages and costs.

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[5] The defendant says (i) that the offending letters are in relation to conversion of a piece of the association's land from agricultural land to commercial land after the building of a petrol station without first converting it into commercial land, (ii) the main cause of the defendant making the alleged defamatory statement was in relation to the apportionment of premium payable to Sibu Land Registry for the conversion of the association's land from agriculture land to commercial land after a petrol service station had been built on the association's land, (iii) the defendant alleged that the plaintiff, as the then chairman cum trustee of the association had betrayed the trust bestowed upon him by the association by putting the association land in jeopardy in the following aspect: (a) had leased the association's land to the said ("the company") (where the plaintiff is also the chairman thereof) for 30 years which expired on 30 May 2031. The lease is in fact more or less 147 months which may contravene the restriction and condition provided in the document of title of the association's land as the lease of said association's land by the State of Sarawak expired on 31 December 2018; (b) had allowed the company to proceed to build a petrol station for commercial purpose without proper application and approval from Sibu Land Registry to convert the said association's land from agriculture to commercial land, thus exposing the association's land liable to be forfeited to

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the Sarawak Land Registry for breaching one of the restrictions and conditions of the land title to the association's land; (c) had subleased the Association's Land to the company upon such terms and conditions not favourable and/or beneficial to the Association eg, allowing the association's land to be charged to Public Bank Berhad for an advance of RM600,000 to be used by the company for the building and construction of a petrol service station to be operated by the company. And the defendant is relying on the statute based defence under s. 8 (Justification) and s. 9 (Fair Comment) of Defamation Act 1957 together with the common law defence of qualified privilege ie, the publication of the alleged defamatory statement was made in a 'privileged occasions'.

Law Of Defamation

[6] The definition of defamation is not a static concept. The learned authors of *Gately on Libel and Skender* (6th edn.) have observed:

> There is no wholly satisfactory definition of a defamatory imputation. Any imputation which may tend 'to lower the plaintiff in the estimation of right-thinking members of society generally', 'to cut him off from society' or 'to expose him to hatred, contempt or ridicule', is defamatory of him. An imputation may be defamatory whether or not it is believe by those to whom it is published.

[7] There are number of cases which have attempted to define defamatory conduct or imputations. Some of them are as follows:

(a) In *Sim v. Stretch* [1936]2 All ER 95, Lord Atkin opined, whether the words were calculated to expose him to hatred, ridicule or contempt in the mind of a reasonable man or would tend to lower the plaintiff in the estimation of right-thinking members of society generally.

(b) In *Berkoff v. Burchill* 4 All ER 1008, the English Court of appeal decided that any imputation that the plaintiff was 'hideously ugly' was capable of being defamatory if the words were plainly intended to convey that message by way of ridicule.

(c) In *Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Berhad & Anor* [1973] 1 LNS 146, Mohamed Azmi J (as he then was) opined:

> Thus, the test of defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinion of others, although no one believes the statement to be true. Another test is: would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally? The typical type of defamation is an attack upon the moral character of the plaintiff attributing crime, dishonesty, untruthfulness, ingratitude or cruelty.

(d) In *Chok Foo Choo v. The China Press Bhd* [1999] 1 CLJ 461, Gopal Sri Ram JCA said:

> In my judgment, the test which is to be applied lies in the question: do the words published in their natural and ordinary meaning impute to the plaintiff any dishonorable or discreditable conduct or motives or a lack of integrity on his part? If the question invites an affirmative response, then the words complained of are defamatory.

(e) In *Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v. Bre Sdn Bhd & Ors* [1995] 1 LNS 304, Richard Malanjum J (as he then was) followed the instance of *JB Jeyaretnam v. Goh Chok Tong* [1984] 1 LNS 139 and adopted the following approach:

> As to whether the words complained of in this case were capable of being, and were, in fact, defamatory of the plaintiff, the test to be considered is whether the words complained of were calculated to expose him to hatred, ridicule or contempt in the mind of a reasonable man or would tend to lower the plaintiff in the estimation of right-thinking members of society generally.

[8] In this area of law it is now almost settled that to be defamatory, an imputation need have no actual effect on a person's reputation, the law looks only to its tendency. There are at least more than six heads of investigation the court employs to determine liability on defamation. They can be summarized as follows:

The Ordinary And Natural Meaning

(a) The ordinary and natural meaning of words may be either the literal meaning or it may be an implied or inferred or an indirect meaning. Therefore, any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be part of the ordinary and natural meaning of words. (see *Jones v. Skelton* [1963] 3 All ER 952).

A **Whether The Words Are Defamatory Of The Plaintiff**

(b) In considering the natural and ordinary meaning complained of it is also necessary to consider whether they were defamatory of the plaintiff. In *Sim v. Strech* [1936] 2 All ER 952, Lord B Atkin observed:

> whether the words were calculated to expose him to hatred ridicule or contempt in the mind of a reasonable man or would tend to lower the plaintiff in the estimation of right-thinking members of society generally.

C In *J.B. Jeyaretnam v. Goh Chok Tong* [1984] 1 LNS 139, it was opined that the words must be considered in the context of the whole speech made by the defendant and in those circumstances. Further, the meaning of the words is a question D entirely for the court. The meaning intended by the publishers is irrelevant for the purpose of construing the words. The test is objective and not subjective. The real question for the court to determine is whether under the circumstances in which the writing was published, reasonable men, to whom the E publication was made, would be likely to understand it in a libelous sense. (see *Lee Kuan Yew v. J.B. Jeyaretnam* [1978] 1 LNS 93).

The Words Must Refer To The Plaintiff

F (c) It is trite there is no necessity to show that the defendant intended to refer to the plaintiff. It is sufficient if reasonable people would think the language to be defamatory of the plaintiff, it was immaterial that the defendants did not intend to defame him. (see *E. Hulton & Co v. Jones* [1910] AC 20).

G In *Knappffer v. London Express Newspaper Ltd.* [1944] AC 116, it was stated that it is an essential element of the cause of action for defamation that the words complained of should be published "of the plaintiff". Where he is not named, the test H is whether the words would reasonably lead people acquainted with him to the conclusion that he was the person referred to. The question whether they did so, in fact does not arise if they cannot in law be regarded as capable of referring to him. If a defamatory statement made of a class or group can I reasonably be understood to refer to every member of it, each one has a cause of action.

(i) The test is an objective test and not subjective. In *Newstead v. London Express Newspapers Ltd.* [1940] 1 KB 377, the reasonable meaning of the words upon the question of whether they refer to the plaintiff must be tested objectively and not subjectively. The question is what do the words mean as words, not what the defendant in his own mind meant by them or intended to mean. However, if it is unintentional defamation s. 7 of Defamation Act 1957 (DA 1957) provides a defence of unintentional defamation. Criteria that need to be satisfied before the defences succeed are as follows: (i) that the publisher did not intend to publish them of and concerning that other person, and did not know of circumstances by virtue of which they might be understood to refer to him; or (ii) that the words were not defamatory on the face of them, and the publisher did not know of circumstances by virtue of which they might be understood to be defamatory of that other person and in either case that the publisher exercised all reasonable care in relation to the publication.

For the defence to be applicable, the defendant must have made an offer of amends as set out in s. 7 of DA 1957 which reads as follows:

(i) in any case, to publish or join in the publication of a suitable correction of the words complained of, and sufficient apology to the party aggrieved in respect of those words;

(ii) where copies of a document or record containing the said word have been distributed by or with the knowledge of the person making the offer, to take such steps as are reasonably practicable on his part for notifying persons to whom copies have been so distributed that the words are alleged to be defamatory of the party aggrieved.

The Words Must Be Published

(d) Published in the law of defamation has a special meaning and at times much dispute takes place whether there was publication. There would not be publication of the words complained if the offensive material was sent directly to the person of whom it is written. It is often the case that the person who is supposed to receive it in the ordinary cause of

A events will not have done so but may have been for example received by the secretary who may have instructions to open the mail. This is an area of law which promotes fertile litigation and occupies much of the court's time. (see *Faryne v. Chorny* [1951] 4 WWR 171).

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Innuendo

[9] Innuendo generally means the defamatory words complained of contain a hidden meaning or inner meaning. Though the words may not be defamatory in their natural and ordinary meaning, it is C a strict rule of pleadings that innuendo must be pleaded and proved. (*Allsop v. Church of England Newspaper Ltd.* [1972] 2 QB 161; *Tolley v. J.S. Fry & Sons Ltd.* [1931] AC 333).

Defences

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[10] The well known defences in an action for defamation are about five and I have already dealt with one of them earlier in my judgment relating to unintentional defamation. The others area as follows:

E **(a) Justification**

In a plea of justification, it is essential for the defendant to prove that (i) the defamatory imputation is true; (ii) justify the precise imputation complained of; and (iii) prove the truth of all material statements in the libel. There must be substantial F justification of the whole libel. However, it is not necessary to prove the truth of every word of the libel. (see *Workers' Party v. Tay Boon Too; Workers' Party v. Attorney-General* [1975] 1 MLJ 47). Further, it is not necessary to prove the truth of every charge if the words not proved to be true do not G materially injure the plaintiff's reputation, having regard to the truth of the remaining charges. This is specifically set out in s. 8 of DA 1957 which reads as follows:

> it is necessary to prove the truth of every charge if the H words not proved to be true do not materially injure the plaintiff's reputation, having regard to the truth of the remaining charges.

(b) Fair Comment

I The meaning of fair comment has not been specifically defined in any case as it is a commonsense construction for example, in *Merivale v. Carson* [1888] QBD 275, Lord Esher at p. 280 opined:

> what is the meaning of a "fair comment"? I think the meaning is this: is the article in the opinion of the jury beyond that which any fair man, however prejudiced or however strong his opinion may be, would say of the work in question? Every latitude must be given to opinion and to prejudice, and then an ordinary set of men with ordinary judgment must say whether any fair man would have made such a comment on the work

And at p. 283 Bowen LJ stated:

> it is only when writer goes beyond the limits of fair criticism that his criticism passes into the region of libel at all … The criticism is to be 'fair', that is, the expression of it is to be fair. The only limitation is upon the mode of expression. In this country a man has a right to hold any opinion he pleases, and to express his opinion, provided that he does not go beyond the limits which the law calls "fair", and, although we cannot find in any decided case an exact and rigid definition of the word 'fair', this is because the judges have always preferred to leave the question what is 'fair' to the jury. The nearest approach, I think, to an exact definition of the word 'fair' is contained in the judgment of Lord Tenterden CJ, in *Macleod v. Wakley* [1828] 3 C & P 311 at 313, where is said, "whatever is fair, and can be reasonably said of the works of authors or of themselves, as connected with their works, is not actionable, unless it appears that, under the pretext criticizing the works, the defendant takes an opportunity of attacking the character of the author; then it will be a libel.

It is trite that to succeed, the defence must establish: (i) the words complained of are comment, though it may consist of or include inference of facts; (ii) the comment is on a matter of public interest; (iii) the comment in based on facts; (iv) the comment is one which a fair-minded person can honestly make on the facts proved.

Further, it is not necessary to prove for the defence of fair comment to succeed, to prove each of the facts pleaded in support; all that is needed is to prove such of the facts as are sufficient to form the basis of a fair comment. The test is an objective one and not subjective, ie, whether on all the facts of the case a fair minded person could have honestly come to the conclusion as the defendant did. In *Merivale v. Carson (supra),* Lord Esher opined:

> … Every latitude must be given to opinion and to prejudice, and then an ordinary set of men with ordinary judgment must say whether any fair man would have made such a comment on the work. It is very easy to say what would be clearly beyond that limit; if, for instance, the writer attacked the private character of the author. But it is much more difficult to say what is within the limit. That must depend upon all the circumstances of the particular case …

However, the defence of fair comment will fail if it is spiked with malice. The test for malice was set out by the House of Lords in *Horrocks v. Lowe* [1975] AC 135 as follows:

> that is, where the defendant knew the publication to be false or where the defendant made the publication recklessly, being indifferent to the truth of what he published and neither considering nor caring whether it was true or not or whether he knew the publication to be false.

(c) Privilege

As a general rule, privilege can be classified into two types, namely absolute and qualified privilege. Absolute privilege arises in very limited circumstances for some of them are as follows: (i) statements made in Parliament; (ii) reports, papers, votes and proceedings ordered to be published by either House of Parliament; (iii) judicial proceedings; (iv) communication between solicitor and client made in connection with litigation; (v) communication made by one officer of state to another in the course of official duty; (vi) section 11 of the Defamation Act provides a defence of absolute privilege as regards fair, accurate and contemporaneous reports of judicial proceedings in Malaysia.

It is trite that where the defendant raises the defence of absolute privilege; it is for him to establish the same. Qualified privilege arises in consequence of public policy grounds. In *Adam v. Ward* [1917] AC 309, Lord Atkinson opined:

> a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

It is essential for the defence of qualified privilege to succeed; to at least satisfy two criterias, ie, one there is a legal, moral or social duty to make the statement on one side. The other is that there is a corresponding interest to receive it. However, if it is spiked with malice, this defence will not be available. (see *Rajagopal v. Rajan* [1971] 1 LNS 117). Ramsamalar Poopalasingam in the article *'The Law of Defamation in Malaysia and Singapore'* [1988] MLJ 1 succinctly summarises as follows:

> (i) fair and accurate reports of parliamentary proceedings; (ii) under section 12(1) of the Defamation Acts of Malaysia and Singapore, certain publication in newspapers are privileged. The types of publication that are privileged are stated in Part I of the Schedule to the Defamation Acts of Malaysia and Singapore; (iii) under section 12(2) of the Defamation Acts of Malaysia and Singapore, certain publications in newspapers are privileged provided the defendant has published a reasonable letter or statement by way of explanation or contradiction if requested by the plaintiff. The situations to which section 12(2) applies are stated in Part II of the Schedule of the Defamation Acts of Malaysia and Singapore;
>
> (iv) statements made by A to B about C
>
> (a) which A is under a legal, moral or social duty to communicate to B and which B has a corresponding interest in receiving. In the case of *J.B. Jayaretnam v. Goh Chok Tong* [1985] 1 MLJ 334, the defendant sought to argue that statements made by him fell under this category. He sought to found the defence of qualified privileged on the fact that at the material time there was a by-election and that the defendant as a politician had a social duty to inform representatives of the media his assessment of the political opponents and that such representatives had a corresponding duty or interest to receive it. Such arguments were rejected;
>
> (b) where A has an interest to be protected and B is under corresponding legal, moral and social duty to protect that interest. In *Rajagopal v. Rajan* [1972] 1 MLJ 45, it was stated that the fact that communication between A and B is privileged does not justify A in making the communication in a manner or at a time which would involve its publication to other persons who have no such interest or duty. No privilege would *prima facie* attach to the publication;
>
> (v) statements made in the protection of oneself or of one's property. An example of this situation is the case of *Osborne v. Boulter* [1930] 2 KB 226. In this case, a publican complained to

A the brewers who supplied him with beer that it was of poor quality. They said that they had heard rumours that the poorness of the beer was due to the watering of it by the publican, and they published this statement to a third party. It was held to be privileged;

B (vi) statements made to the proper authorities in order to procure the redress of public grievances. The complaint, in order to be privileged, must be addressed to the right person, that is, to someone who has some power of redressing the grievance. Meticulous selection of the proper official is not necessary.

C And concludes as follows:

The law of defamation in Malaysia and Singapore closely follows the English laws on defamation. It is a matter of law for the judge to determine whether or not the words complained of are capable D of a defamatory meaning and whether the words complained of are capable of being taken as referring to the plaintiff. In practice, this is certainly, not an easy decision to make and may lead to division of judicial opinion. If the judge is left in doubt, he should rule that the words are incapable of a defamatory meaning. Perhaps the difficulty lies with the test laid down by Lord Atkin E in the case of *Sim v. Stretch* [1936] 2 All ER 952, that is, whether the words were calculated to expose him to hatred, ridicule or contempt in the mind of a reasonable man or would tend to lower the plaintiff in the estimation of right-thinking members of society generally. The phrases 'the mind of a F reasonable man' and 'in the estimation of right-thinking members of society generally' make this test an objective one. However, it is not always easy to perceive what opinion the reasonable man would hold and also it is difficult to define who right-thinking members of society are or what their estimation of the particular words alleged to be defamatory would be.

G

Defendant Version And Explanation

[11] The defendant says (i) on 21 August 1987 and with the blessing of Extra Ordinary Meeting ('EGM') of the association, the H plaintiff (as Chairman of the association)'s proposal to convert the association's land to a profit making petrol service station was approved. (ii) on 6 November 1987, the plaintiff (as then chairman of the association) wrote a letter to the Sibu Land Registry applying to convert the association's land from agricultural to a I Petrol Service Station cum Marine Station (commercial). (iii) in 1991 and without obtaining a proper and written approval from Sibu Land Registry to convert the association's land from agriculture to commercial land, the construction of the petrol

service station commenced. (iv) on 31 May 1991, a memorandum of sublease ('the sublease') was entered between the Association and Berhad (company) for 30 years which was duly signed and executed by the plaintiff as one of the then trustees of the association. (v) the sublease *vide* cl. 3(2) had expressly allowed the association's land to be charged so as to enable the company to borrow any money by way of advances or loan not exceeding RM600,000 which may be required for the construction and building of the petrol service station. (vi) on 7 October 1991, a memorandum of charge of the association's land was duly signed and executed by the plaintiff as one of the trustees of the association in favour of Public Bank to secure a sum of RM600,000 to be advanced to the company. Instead of registering the said charge, the said bank had entered a caveat on the association's land based on the unregistered charge. The sum of RM600,000 was duly advanced to the company. (vii) in 1992 and under the chairmanship of the plaintiff, the petrol service station was duly completed and commenced its business thereafter and the defendant took his office and succeeded the palintiff as chairman of the association after 1992's AGM. (viii) on 26 July 1994 and only after the petrol service station being completed, the company then wrote to Sibu Land Registry enquiring the status of the association's land so that certain outstanding documentation could be completed. (ix) only on 11 August 1994, the Sibu Land Registry had eventually approved the conversion of the association's land for the use of petrol filing station for 60 years subject to payment of premium of RM106,000 within 60 days and a 60 days grace was granted to the Association to consider accepting the offer, bearing in mind that the defendant was the chairman of the association at that material time. (x) between the period 11 August 1994 and 6 September 1997, the Sibu Land Registry had altogether wrote four reminders and granted four extentions of the grace period to the association to comply with the offer as stated in their letter dated 11 August 1994 by settling the premium of RM106,000.00. (xi) after the offer by the Sibu Land Registry to convert the association's land to commercial purpose subject to the payment of premium of RM106,000 in 11 August 1994, the defendant, as chairman of the Association and with a view to verify whether the outstanding matters touching on the association's land were in order, had made various enquiries from various parties involving in the dealing with the association's land, that is as follows:

A (a) to the company for copy of the sublease:

on 13-09-1994, the defendant as chairman of the association wrote a letter addressed to the Chairman of CCB requesting a copy of sublease to be supplied to the Association for its file's record and reference which CCB had complied with.

B (b) to the chargee/Public Bank for letter of offer by 'Shell' to the company:

on 10-10-1994, the defendant as chairman of the Association also wrote a letter to Chargee/bank requesting for letter of C offer from shell to CCB.

(xii) pursuant to an EGM's resolution passed by the association in 1995, the defendant as chairman of the association had by a letter dated 13 December 1995, formally requested the company D to remit a sum of RM53,000 being the 1/2 share of the premium for the conversion of the association's land. (xiii) on 26 December 1995, the company *vide* a letter addressed to the defendant as chairman of the association, explained 'in no uncertain terms' that the association 'legally or morally should pay the premium' and E maintained that the company will 'not entertain, nor should it in any circumstances acceded' to the association's demand. (xiv) on 21 May 1996, the defendant as chairman of the association wrote to the plaintiff as chairman of the company in respect of matters touching on the association's land, the sublease, the premium, the F caveat, the unregistered charge and RM600,000 advanced by the bank to the company and also demanded RM53,000 being 1/2 share of the premium to be paid by the company. The defendant as chairman of the association had also stated that the association 'shall be compelled to take such legal actions against CCB (the G company) as may be advised'. And the company again refused to comply with the association's request. (xv) on 15 July 1996, the plaintiff, as chairman of the company, wrote to the defendant as chairman of the association stating that the association 'must immediately proceed to convert the Association's Lease' and also H 'must without delay pay the premium of RM106,000', otherwise the association's land may 'run the risks of forfeiture of its lease' by the state government.

Defendants Submission

I **[12]** The defendant's submission in this case can be summarised as follows:

(a) Justification

The defendant says the words/statement made by the defendant's letter is not defamatory as it merely narrates the true facts that the plaintiff had not complied with the reasonable enquiries made by the defendant as chairman of the Association which he is justified to make in the circumstances of the case.

(b) Fair Comment

Alternatively, the defendant says that the words/statement made by the defendant is not defamatory but a fair and honest comment consisting of true facts and inference drawn from such facts gathered from the agreed/admitted documents and made for the interest of the members of the Association which a fair minded man could honestly make on the facts and in the circumstances of the case.

(c) Qualified privilege

In the further alternative the defendant says the word statement published by the defendant is a communication made in an individual privileged occasion where, the defendant, as the then Chairman of the Association, is under a legal, moral or social duty to all the members of the association and the members of the Association is also under a duty to be well informed about the legitimate progress touching on the Association's Land and be guarded by the consequences of the association's land being forfeited by the government and the potential litigation concerning the procedural impropriety of the conversion of the association's land thereby indirectly affecting the memorandum of sublease, memorandum of charge, etc. Bearing in mind that the defendant, as the then chairman of the association, was also under an obligation to protect the proprietary interest of the association's land for the benefit of the association in view of the circumstances of the case.

[13] Plaintiff's Reply

The plaintiffs in crux had articulated the submission as follows:

The victim here is Mr. Chew Peng Cheng. The sting of the defamation was directed at him in his personal capacity as can be seen in the first letter which was personally addressed to him.

Even though paragraph 3 of the said letter was in reference to an act performed by Plaintiff as the then Chairman of CCA the accusation of wrongdoing and the defamatory nature of the allegation is a stigma that affected him personally and not as the chairman of CCA. This letter was written in reference to a purported act done 6 years earlier in 1991. The Plaintiff relinquished that duty in 1992 when the Defendant took over as the chairman. Whether it was a past act, the publication belittles him and the humiliation and embarrassment associated with it lingered on to affect him personally beyond the publication. It attacks the very root of his character. He is the sole bearer of that accusation not the Chairman of CCA. In the eyes of the right thinking man it matters not whether it was an act done in his capacity as the then Chairman of the CCA because any act done by the chairman can only be done by the Plaintiff alone when he held that post. It is quite unlike an allegation relating to the collective act of CCA like an act passed in the AGM of the Association chaired by Plaintiff as Chairman because any right thinking person will say that was an act of the Association as opposed to a personal act. To hold otherwise will open a flood gate and a possible new defence to plea in defamatory words written of the person affected.

The second letter was addressed to the Plaintiff as chairman of CCB. CCA and CCB are two different entities. But the attack made on the Plaintiff was personal. In paragraph 5 of the 2nd letter the Defendant said "However it was your continued intransigence that compelled us to probe deeper into the transaction involving the Land which belongs to the Association". The allegation of wrong doing here was not CCA but him personally.

There was complete transparency in the way the Plaintiff acted in the discharge of his duty to secure the conversion of the Land, the construction of the petrol kiosk and the application the procurement of the Loan from the Bank to finance the construction of the petrol kiosk was not the individual act of the Plaintiff but the collective act of the CCA. It was carried out through the right machinery of CCA. The Plaintiff did not personally benefited from the act. The decision to convert the said Land was approved in the EGM of the CCA. The AGM of CCA amended the Rule of CCA so that a Committee had the power to directly and indirectly involve in business to develop the Land. It was also the Committee of which the Defendant were in agreed on the rental terms and condition of the sublease to CCB. It was also the committee that decided and agreed that the said Land be mortgaged. There is no a single piece of evidence that the Plaintiff himself has a personal hand in the application for conversion, the sublease of the petrol kiosk to the CCB or the subsequent

application for loan and the charge of the said Land to the bank for the a loan to finance the construction of the said Petrol kiosk. The only evidence was the discharge of his duty as a Trustee when he signed the Memorandum of Charge. He has no personal benefit to gain when he signed in that capacity. The members CCA on the other hand reaps the benefit because the Land was converted and on it was a petrol Kiosk. All allegations of wrong doing were not substantiated.

The Defendant could not honestly believe in the truth of the impugned words where the amendment to Rule 23(d) could easily have been checked out. The Defendant ought to have been all the more alert to verify the truth. The defendant omitted to take such steps because he did not care whether the matters relating to allegation true or not. In short, the defendant was indifferent to the truth or otherwise of the words and allegations made by him. There is of no public interest in the matter because the allegation was of importance only to the Plaintiff and the Defendant as the accuser. Should the Plaintiff be held ransom for the legitimate discharge of that duty to be haunted years later by an allegation that has no truth in it? Should he not in the office of Chairman and trustee be allowed to perform his duties without fear and favour? Here we have a case of the Defendant who in the pursuant of an ulterior motive threatened that if Plaintiff as chairman on CCB would agree to pay the premium then he then he would close an eye in to the further allegation of the Land transaction. This allegation carried all the imputation that the Plaintiff alone was carrying on something illegal .It has all the ring of dishonesty on the part of the Plaintiff.

The Plaintiff has ever legitimate right to resist paying the premium demanded of it because he felt that was not the duty of CCB who was not the owner of the Land. His continued intransigence was merely a manifestation of his stand and duty to CCB. He should not be made to suffer for adopting that stand and in the process have his image and reputation tarnished. The Defendant must not be allowed to use the cloak of CCA to shield himself from defamatory remarks or statement made with the intent to defame the Plaintiff. His allegation of that "all the trust bestowed on you by the Association had been betrayed by your act" was aimed on the Plaintiff alone and made with ulterior motive.

[14] I have read the application, the relevant documents and the submission of the parties in detail. I take the view that the plaintiff's claim for defamation must fail. My reasons are as follows:

A (a) The definition of defamation is not a static concept to give recognition to the time immemorial principle that there must be certainty in law. This is one area of law where in almost all cases judges suffer difficulties in trying to understand the definition and applying it in changing circumstances and value
B in society. In addition, lot of plucking of sum for the purpose of compensation is usually made of by the court with no deliberation on the methodology employed. Some of the figures awarded have in actual fact scandalized the judges and brought great shame to the judiciary.

C (b) I do not think the words complained of can be construed as defamatory in this time and era where public perception to accountability, transparency, good governance in respect of people holding office, or position, or who get involved in the
D affairs of organisation such as associations has become more and more, a subject matter of critical scrutiny by the public or by those who are associated with it. Even, judicial institution which has been given absolute protection under the Federal Constitution has been the subject matter of critical
E comment in respect of their conduct as judges. In fact, the Federal Constitution art. 127, says the conduct of the judge cannot be questioned unless the procedure in the said article is complied with; that article reads as follows:

F > The conduct of a judge of the Federal Court, the Court of Appeal or a High Court shall not be discussed in either House of Parliament except on a substantive motion of which notice has been given by not less than one quarter of the total number of members of that House, and shall not be discussed in the Legislative Assembly of any State.

G Notwithstanding such a sacrosanct protection, public demand for accountability, transparency and good governance has won the day, and judges' conduct as a judge is liberally attacked, that too in breach of natural justice without the judge being
H given an opportunity to reply in public his reasons, or his side of the story. It is beyond doubt that such attacks put the judge into hatred, ridicule, or contempt in the mind of reasonable man with no remedy for the judge, unless he initiates defamatory proceeding, or lodges a criminal complaint.
I Such action by a judge is not commonly precedented in the commonwealth. This may be because of practical reasons, primarily for the judge to safe guard the dignity of his office.

As I said earlier, definition of defamation is not a static concept. It must meet with the revolutionary thoughts of men from time to time as the test is objective. Now the focus being transparency, accountability, good governance etc. Thus, purely objecting to criticism by filling suits for defamation that too in millions of ringgit when issues of transparency, accountability and good governance is the focal point of the attack, does not promote constitutional rights to freedom of speech. I take the view that the courts now will be reluctant to entertain them, unless the attacks are in the nature which has no nexus and/or is not inextricably interwoven to the concept of transparency, accountability and corporate governance, and such acts are done with malice purely to assassinate the character of the individual personally and destroy his family, quality of life and privacy.

(c) Even if I am wrong, I take the view that the words complained of does not expose the plaintiff to hatred, ridicule or contempt or contempt in the mind of a reasonable man in this time and era, or would tend to lower the plaintiff in the estimation of right thinking members of society.

(d) I also take the view by setting out the circumstances leading to the publication of the purported offensive words the defendants have proved substantial justification of the whole libel and there does not appear to be element of malice, taking into consideration the complaint and dissatisfaction was addressed to the plaintiff directly.

(e) In addition, the submission of the defendants on fair comment has some merits and the defendants are entitled on the facts of the case to make such comments though it may be critical. Any fair minded person would have reasonably done so. I do not find any element of malice as it cannot be said the facts stated in the publication were false or the defendant made the publication recklessly.

(f) I also think there is merit in the submission of the defendant in respect of the defence of qualified privilege. It is beyond doubt in this case there is a legal, moral, or social duty to make the statement on one side and there is corresponding interest to receive it on the other side. From the facts leading to the publication, I do not find the defendant's conduct is spiked with malice.

A

Conclusion

[15] The law on defamation is nothing more than judge made law never having been defined intelligibly from the time it was recognised as a tort. In addition, it is regrettably seen as a
B necessity to promote social harmony and to ensure that a person's integrity and dignity is not blemished without the pain of being compensated in monetary terms by persons who breach the sacred code and imprecise definition. In many commonwealth countries such as India and Malaysia, this tort has been statutorily codified,
C as a penal offence. Arguably it can be said that after it being codified courts should not have followed the common law remedy of defamation. Failing to do so, has promoted too many number of cases filed in a time and era where court has been inundated with much work. Courts' resources without being utilized to clear
D pending criminal cases where prisoners are languishing in prisons, are much used to hear this tort (when there is already an adequate criminal remedy to maintain social order and harmony) for one purpose, ie, to compensate the plaintiff.

E **[16]** In fact, I will go to the extent of saying that time has come for parliament to make defamation purely a criminal offence and make provisions for the criminal courts to order compensation, providing for a statutory maximum limit and/or alternatively to have all defamation matters heard before a magistrate or sessions judge,
F giving them the jurisdiction to hear and award damages to a defined maximum limit. There is no reason for a High Court judge to hear defamation suits at the expense of tax payers when the court is inundated with much work more so when substantial numbers of prisoners facing capital punishment are languishing in
G jail.

[17] For reasons stated above (other than paras. 16 and 17), I dismiss the plaintiff's action for defamation with costs. The getting up fees shall not exceed RM30,000. If costs cannot be agreed the defendant is at liberty to tax the costs.

H

I hereby order so.

I